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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001562-MR

SCOTT DANIEL HESS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 07-CR-003535

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: VANMETER, ACTING CHIEF JUDGE; NICKELL, JUDGE;
LAMBERT,¹ SENIOR JUDGE.

NICKELL, JUDGE: Scott Hess has appealed from the Jefferson Circuit Court's
July 21, 2008, judgment of conviction and sentence following a jury trial on one

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

count of tampering with a witness,² two counts of assault in the fourth degree,³ illegal use or possession of drug paraphernalia,⁴ and being a persistent felony offender in the first degree (PFO I).⁵ We affirm.

Scott was married to Tonia Hess for six years prior to their divorce in 2006. In mid-2007, the couple attempted to reconcile, and Scott occasionally visited Tonia's home overnight even though he did not live there. On July 19, 2007, Scott became agitated during dinner at Tonia's home and went into the bathroom to shower. Shortly thereafter, Scott began yelling and "banging around" in the bathroom and Tonia heard glass breaking. Tonia telephoned Scott's father hoping he would be able to calm the situation. While standing at the bathroom door with her cell phone in hand, Tonia pleaded with Scott to speak with his father. Instead, Scott broke through the door with an unknown object. Some of the flying debris struck Tonia in the face. Scott grabbed the phone from Tonia's hand and threw it, causing it to break. Upon hearing the commotion, neighbors contacted the police. When police arrived, they arrested Scott for assault in the fourth degree and intimidating a witness in the legal process.⁶

² KRS 524.050, a Class D felony.

³ KRS 508.030, a Class A misdemeanor.

⁴ KRS 218A.500, a Class A misdemeanor.

⁵ KRS 532.080(3).

⁶ KRS 524.040, a Class D felony.

On August 11, 2007, Louisville police again responded to Tonia's home upon receiving a report that Scott had kicked in the front door and broken into the home. When police arrived, Tonia's throat was red and she explained that Scott had assaulted her with a sword. Scott had fled the scene but officers located him a short time later hiding in the basement of a friend's home. When they found him, officers located drug paraphernalia near his person, and Scott showed them the location of a crack pipe and baggies. Scott admitted he had smoked crack cocaine two days earlier. Scott was arrested for the offenses of burglary in the first degree,⁷ assault in the fourth degree, possession of drug paraphernalia, and contempt of court.

While incarcerated on these latest charges, Scott had numerous telephone conversations with Tonia. These conversations were recorded as a routine matter by the Jefferson County Detention Center and would later be played for the jury. Based on the contents of some of the conversations, the Commonwealth sought an additional criminal charge of tampering with a witness⁸ against Scott. A Jefferson County grand jury indicted Scott for the offenses of tampering with a witness, illegal use or possession of drug paraphernalia, two counts of assault in the fourth degree, and being a PFO I. Following a three-day jury trial, Scott was convicted on the tampering and assault charges. The jury fixed his sentence at an aggregate of five years' imprisonment on those charges,

⁷ KRS 511.020, a Class B felony.

⁸ KRS 524.050, a Class A misdemeanor.

enhanced to eighteen years by virtue of his status as a PFO I. This appeal followed.

Scott raises four allegations of error before this Court. First, he alleges the trial court erred in failing to grant his motion for a directed verdict on the tampering charge. Next and alternatively, that he was denied the right to a unanimous verdict on the tampering charge. Third, Scott contends the prosecutor improperly vouched for the reliability of the investigating officer. Finally, he argues his sentence was disproportionate to the crimes charged and thus amounts to cruel and unusual punishment. Having reviewed the briefs, the record, and the law, we affirm.

Scott first alleges the prosecution failed to meet its burden of proof under either subsection of KRS 524.050.⁹ Thus, he argues the trial court erred in denying his motion for a directed verdict of acquittal on the tampering with a witness charge. We disagree.

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient

⁹ KRS 524.050 states:

(1) A person is guilty of tampering with a witness when, knowing that a person is or may be called as a witness in an official proceeding, he:

(a) Induces or attempts to induce the witness to absent himself or otherwise avoid appearing or testifying at the official proceeding with intent to influence the outcome thereby; or

(b) Knowingly makes any false statement or practices any fraud or deceit with intent to affect the testimony of the witness.

(2) Tampering with a witness is a Class D felony.

to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). The standard of appellate review from the denial of a directed verdict motion is “if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict of acquittal.” *Id.* (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)).

The jury was permitted to hear numerous recorded conversations between Scott and Tonia which occurred while Scott was incarcerated on the instant charges. Taking those conversations in the light most favorable to the Commonwealth, there was sufficient evidence before the jury to support a guilty verdict. The Commonwealth proved a “no contact order” prohibiting Scott from any and all contact with his ex-wife was in effect when many of the conversations occurred. The Commonwealth then produced and played nearly ninety minutes of recorded conversations between the pair, noting that the recordings constituted only a portion of the total conversations which took place.

On the recordings, the jury heard Scott attempting to persuade Tonia to tell prosecutors “the whole thing was a big [expletive] misunderstanding” and she needed to help him “get out of this mess.” He further repeatedly accused Tonia of lying, asked her why she was “put[ting him] in prison for five more

years,” told her their relationship was over if he was convicted, and urged her to explain the events to authorities the way he told her they had happened. Scott also accused Tonia of giving signed statements to the police “accusing him of things they both agree he did not do” but no such signed statements appear in the record. The underlying theme of the conversations was Scott’s desire for Tonia to “make things right.” To that end, Scott encouraged Tonia to take whatever steps necessary, including the possibility of falsifying her testimony to comport with Scott’s recollection of events, in an effort to persuade prosecutors to dismiss the charges against him prior to trial so that she would not have to testify against him. Failing dismissal, Scott encouraged Tonia to mold her testimony in a way that would be most beneficial to his case.

Clearly, from the evidence presented, it would have been reasonable for a jury to find Scott guilty of the offense of tampering with a witness. Scott plainly suggested ways for Tonia to avoid having to testify and ways for her to falsify her testimony for his benefit. Substantial evidence was presented to support a conviction under the theory that Scott had attempted to induce Tonia to absent herself from the proceedings and under the alternate theory that Scott made false statements with the intent to influence Tonia’s testimony. Due to the presentation of substantial evidence, Scott was not entitled to a directed verdict of acquittal and no error occurred in denying his motion for same. *Benham*.

Second, Scott argues he was denied a unanimous verdict because the Commonwealth failed to introduce sufficient evidence to support a finding of his

guilt on the tampering charge under both theories of its case. Jurors were instructed on the requirements of finding guilt under both sections of KRS 524.050. Scott claims the Commonwealth failed to prove he was guilty under both subsections, thus making it impossible to ascertain whether all of the jurors voted to convict him based on a theory supported by the evidence. We disagree.

It is fundamental in this Commonwealth that a defendant in a criminal trial is entitled to a unanimous verdict. *Hayes v. Commonwealth*, 625 S.W.2d 583, 584 (Ky. 1981). However, contrary to Scott's assertion, an instruction allowing a jury to convict a defendant of the same offense under two different theories does not deprive the defendant of a unanimous verdict if either theory is supported by substantial evidence. *Miller v. Commonwealth*, 77 S.W.3d 566, 574 (Ky. 2002); *Johnson v. Commonwealth*, 12 S.W.3d 258, 265-66 (Ky. 1999). Here, the combination instruction described two alternative theories by which a conviction could be sustained. Based on the evidence adduced at trial, the jury could easily have believed Scott's recorded conversations evinced an intent to induce Tonia to avoid appearing at trial to testify. However, the conversations were also laced with false statements that the jury could have reasonably believed were intended to alter or affect Tonia's testimony. Substantial evidence was presented on both of these theories. It is immaterial which theory jurors chose to believe as the resulting conviction would be the same. *Hudson v. Commonwealth*, 979 S.W.2d 106 (Ky. 1998). *See also Burnett v. Commonwealth*, 31 S.W.3d 878 (Ky. 2000); *Ice v.*

Commonwealth, 667 S.W.2d 671 (Ky. 1984); *Hayes*; *Wells v. Commonwealth*, 561 S.W.2d 85 (Ky. 1978).

The legal effect of the alternative conclusions is identical. There was ample evidence to support a verdict on either theory of the case. We hold that a verdict can not (sic) be successfully attacked upon the ground that the jurors could have believed either of two theories of the case where both interpretations are supported by the evidence and the proof of either beyond a reasonable doubt constitutes the same offense.

Wells, at 88. The instructions were not prejudicial and Scott was not denied a unanimous verdict.

Next, Scott contends the Commonwealth's Attorney improperly vouched for the reliability of the investigating officer in its closing statement by telling the jury "yes, you can believe Officer Ron Charles." Although Scott admits this allegation of error is unpreserved, he asks us to review his claim under the palpable error standard set forth in RCr¹⁰ 10.26. Under that rule,

[a] palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Id. "Manifest injustice" requires that the substantial rights of the defendant be prejudiced by the error, meaning there is a substantial possibility the result of the trial would have been different. *Schaefer v. Commonwealth*, 622 S.W.2d 218 (Ky. 1981); *Jackson v. Commonwealth*, 717 S.W.2d 511 (Ky. App. 1986). This is often

¹⁰ Kentucky Rules of Criminal Procedure.

described as a defect which is “shocking or jurisprudentially intolerable.” *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006). In *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006), our Supreme Court further refined the parameters of RCr 10.26 when it explained what constitutes palpable error.

For an error to be palpable, it must be easily perceptible, plain, obvious and readily noticeable. A palpable error must involve prejudice more egregious than that occurring in reversible error. A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. Thus, what a palpable error analysis “boils down to” is whether the reviewing court believes there is a “substantial possibility” that the result in the case would have been different without the error. If not, the error cannot be palpable.

In commenting on the veracity of the Commonwealth’s witness, the prosecutor improperly injected personal beliefs and feelings into the trial and implicitly commented on the weight of the evidence. Although the prosecutor’s statement was improper, we cannot say it rises to the level of palpable error. The statement was brief, and was followed by a proper outline of the charges against Scott. Again, while improper, the prosecutor’s statement does not rise to the level of “manifest injustice,” as required by RCr 10.26. *Martin*, 207 S.W.3d at 3. Thus, there is no substantial possibility the prosecutor’s statement affected the result of the trial, and therefore there was no palpable error.

Finally, Scott argues the sentence he received was grossly disproportionate to the charges of which he was convicted. He argues the five-year sentence, enhanced to eighteen years, amounts to a violation of the prohibition

against cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution.¹¹ *See Solem v. Helm*, 463 U.S. 277, 288, 303, 103 S.Ct. 3001, 3008, 3016, 77 L.Ed.2d 637 (1983) (Eighth Amendment prohibits extreme sentences that are grossly disproportionate to the crime committed). *See also Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). Scott again concedes this argument is unpreserved, but requests palpable error review. After a careful review for the presence of palpable error, we are not persuaded that Scott's sentence was constitutionally infirm.

Scott was convicted of the offense of tampering with a witness, a Class D felony, by a jury of his peers and was sentenced to the statutory maximum term of five years' imprisonment. *See* KRS 524.050. He was also sentenced as a PFO I, which means the jury could have sentenced him to anywhere between ten and twenty years' imprisonment. *See* KRS 532.080. The jury chose eighteen years.

During the PFO stage, the jury heard of Scott's previous felony convictions for burglary. After hearing the facts surrounding his criminal background, the jury fixed Scott's sentence in the upper one-third of the permissible penalty range. That decision was reasonable under the facts of this case. The PFO statutes were designed by the legislature to lengthen the period of

¹¹ The Constitution of Kentucky contains a similar prohibition. However, the proscription contained therein is against "cruel punishment" rather than "cruel and unusual punishments." Our Supreme Court has held this to be "a distinction without a difference." *Riley v. Commonwealth*, 120 S.W.3d 622, 633 (Ky. 2003).

incarceration for those with a criminal history. It is axiomatic that states are justified in sentencing repeat offenders more harshly than first-time offenders. *Solem*, 463 U.S. at 296, 103 S.Ct. at 3013. Thus, as the jury's sentencing recommendation was within the applicable penalty range, Scott's sentence is not grossly disproportionate to the crimes he committed. *Riley v. Commonwealth*, 120 S.W.3d 622, 633 (Ky. 2003) ("if the punishment is within the maximum prescribed by the statute violated, courts generally will not disturb the sentence."). No error occurred.

Therefore, finding no error in the proceedings, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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